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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK KEGEL

Defendant and Appellant.

B217566

(Los Angeles County  
Super. Ct. No. VA103325)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Dewey Lawes Falcone, Judge. Affirmed with directions.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant, Frank Kegel, appeals the judgment entered following his conviction, by jury trial, for conspiracy to defraud another of property, grand theft of personal property by false pretenses (two counts), unlawful use of a peace officer's badge, burglary (four counts) and attempted burglary (Pen. Code, §§ 182, subd. (a)(4), 487, 538d, subd. (b)(2), 459, 664/459).<sup>1</sup> He was sentenced to state prison for a term of 10 years.

The judgment is affirmed.

### **BACKGROUND**

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The Benavidez Family.*

Jose Benavidez was the son of Rita Ramos Molina. After a brief hospitalization for a heart condition, Benavidez died at home on September 22, 2007.<sup>2</sup> At Benavidez's funeral, a family friend introduced Molina to Martin Pelayo, the codefendant in this case. The friend said Pelayo was a sheriff and he might be able to help the family with the disposition of Benavidez's body. When Molina called Pelayo, he told her Benavidez had possibly been released from the hospital prematurely and that his death might have been the result of medical negligence.

A week after Benavidez's death, Pelayo came to Molina's home in Long Beach. He was accompanied by defendant Kegel, who introduced himself as a sheriff. Molina testified she believed him because Kegel had a gun and was wearing a badge on his waist. Pelayo too introduced himself as a sheriff; he was also wearing a badge and had a gun. Pelayo said they could help Molina get her son out of the morgue, but he would have to be put into a common grave because the family did not have enough money for a

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> All further calendar references are to the year 2007 unless otherwise specified.

funeral, which would cost \$60,000 including court costs. Molina and her family believed Kegel and Pelayo were also going to help investigate the hospital.

Pelayo and Kegel returned to Molina's house on October 2. Pelayo said he had gone to Long Beach Hospital to look for Benavidez's medical file and discovered the treating physician had been arrested. Pelayo also told Molina arrest warrants had been issued for members of her family alleging they had neglected Benavidez's care and caused his death. The family paid Pelayo and Kegel \$7,000 and signed a document saying they owed another \$10,000. Molina testified she understood they were paying this money for bail.

Two days later Kegel and Pelayo contacted Molina again, asking for the \$10,000. Molina had to borrow the money from her sister, who had lent her the initial \$7,000. Kegel and Pelayo came to Molina's house and picked up the \$10,000 in cash. Pelayo had said "the judge or the court would not take any checks . . . ."

The Benavidez family gave Pelayo and Kegel \$17,000.

b. *The Calvillo family.*

Francisco Calvillo had been a United States Marine. In October 2006, after returning home from a tour of combat duty in Iraq, he was murdered by an unknown assailant outside his home in South Gate.

A year later, Calvillo's mother, Crisanta Casillas, was visiting his grave when she had a chance conversation with a member of the Benavidez family who said he knew of two police detectives who could help investigate her son's death. Casillas offered her phone number to be passed on to the detectives.

On about October 18, 2007, a man identifying himself as Martin Pelayo called Casillas and offered to investigate her son's murder. Casillas had her daughter, Magdalena Calvillo, contact Pelayo. Pelayo identified himself to Magdalena Calvillo as a police detective. He said his office was in the Whittier STAR Center, which houses Los Angeles County Sheriff's Department offices. Pelayo told Magdalena he would investigate her brother's murder, which entailed checking out the crime scene, collecting evidence and interviewing witnesses.

Pelayo told Casillas \$85,000 was necessary to start the investigation. He said this money was not for him, because he would get paid by the courts, but that it was needed to “reopen” the case. Casillas did not have that much money and asked if there wasn’t a special program for low income people. Pelayo said the cost of the investigation could be reduced to \$15,000 because Casillas did qualify as low income. He said someone named Brock would be contacting her. Later that day, a man identifying himself as “Brock Sampson” left two phone messages for Casillas.

A meeting was arranged for Casillas and her family to meet Pelayo and Brock at the STAR Center that same night. Brock turned out to be defendant Kegel. The meeting was set for 7:00 p.m., but Casillas and her family did not arrive until 7:30. Pelayo said the office closed and they would have to talk in the parking lot. There were papers for Casillas to sign. Because she did not speak English, Kegel explained their contents to her children, who translated them into Spanish for Casillas. One document stated the \$15,000 she was agreeing to pay would be reimbursed by the court within 15 days. Another document purportedly referred to an insurance policy on Francisco Calvillo’s life. Casillas was told Kegel worked for the attorney handling the insurance matter. Kegel handed these documents to Casillas, who signed them and returned them to him.

Pelayo introduced himself to Casillas’s son, Cesar Calvillo, as a Sheriff’s detective. Kegel introduced himself as “the assistant of a well-known lawyer.” Kegel said he would be working with Pelayo on the investigation, that Pelayo would be the officer in charge and Kegel would be handling the “[p]aperwork for the lawyers.” Kegel said he had worked on cases with Pelayo before, that Pelayo “was a very good detective, and that they would always solve their cases.”

The next day, Pelayo called Casillas to say they had received a lead on the whereabouts of Francisco’s widow, Sonia, who they believed might have been involved in his death. Pelayo said Kegel had gone to Texas to interview Sonia. When Casillas next saw Kegel, he said he had visited Sonia at a police station in Texas.

There were more phone calls in the following days. Pelayo told Casillas not to worry about coming up with the entire \$15,000 because he could get \$8,000 from the county. On October 22, Kegel and Pelayo went to the Calvillo home. Pelayo told the family he and Kegel were going to reopen Francisco's murder, but "there would be court fees that would be needed to be paid to get the case started." Casillas gave Kegel \$6,000. Kegel said he was taking this money "[t]o the court in Los Angeles."

Subsequently, another family member, Esteban Calvillo, got a call from Kegel saying the detectives needed help. They had a suspect, but "they couldn't interview him because he was protected, so they needed \$20,000 to take that protection off." Kegel said it was important to get the \$20,000 right away, by November 2 at the latest. When Esteban said he couldn't come up with the money that fast, Kegel said not to worry, he would lend the family \$3,000 out of his own pocket and they only needed to come up with the other \$17,000.

By October 31, Casillas had managed to borrow \$9,000 from various family members. Kegel told Esteban the \$9,000 was fine and mentioned he was calling from the Montebello Police Station. When Esteban asked for the address so he could deliver the money, Kegel said he was just on his way out and that Esteban should meet him at a Mobil station on San Gabriel Boulevard. At the gas station, Esteban asked Kegel how the case was going. Kegel said Pelayo was on his way out of town to meet with other detectives working on the case. Casillas gave Kegel the \$9,000.

Meanwhile, there were a series of purported court dates which kept getting cancelled at the last minute. This made Casillas's daughter, Magdalena, suspicious. She spoke to a receptionist at the STAR Center and was told there was no such person as Detective Pelayo. Magdalena gave this information to her aunt, who called the police.

On November 6, Kegel and Pelayo took Casillas and her husband to the Criminal Courts Building in downtown Los Angeles, and then to the STAR Center in Whittier. Detective Nicholas Cannis, whose office was in the STAR Center, had been asked to meet with a woman about whether two men assisting her on a case were in fact police

officers. When Cannis arrived, Casillas pointed out Kegel and identified him as one of the purported officers.

Cannis approached Kegel and asked if he were a police officer. Kegel said yes. When Cannis asked whom he worked for, Kegel said he was an L.A.P.D. detective working a special investigation. When Cannis asked to see some identification, Kegel showed him a badge. Because the badge was partially obscured by its case, Cannis asked to look at it more closely and Kegel handed it over. Although it vaguely resembled a legitimate L.A.P.D. badge, it said "Investigator, Loss Prevention." Asked about this, Kegel said he was doing a special investigation for loss prevention at WalMart. At that point, Cannis arrested him.

Later that evening, at the Norwalk sheriff's station, Detectives Michael Staley and Dana Duncan met with Kegel in an interview room. They told him he had been arrested for impersonating an officer and defrauding people. Duncan then said one of the victims was the family of a Marine who had seen combat in Iraq, only to return home to California and get murdered. Kegel said, "I didn't know . . . she was a Marine's mom. I wouldn't have ripped her off if I had known that. I feel like shit now. I feel terrible for doing that."

The Calvillo family had given Kegel and Pelayo \$28,000.

## *2. Defense evidence.*

Kegel testified he met Pelayo in 2005 on the set of the television series "Scrubs" where Kegel was working as a medic, earning \$100,000 a year. Kegel, who had formerly worked as a national ski patrol instructor and a firefighter, testified he was a little bored with his job.

Victor Gomez testified he was the head security guard for the Scrubs show and, like Kegel, he wanted to expand his professional horizons. Gomez developed an interest in becoming a professional bodyguard after talking to Martin Pelayo, one of the other security guards. Pelayo said the job paid well, had excellent benefits and involved lots of first class travel. He also said the job was connected to Homeland Security.

Pelayo talked about putting together a bodyguard team and said they would need a medic. Gomez informed Kegel, who was interested.

Pelayo was wearing a badge on his hip when Kegel was introduced to him. Pelayo explained this was his deputy sheriff's badge. He confirmed Gomez's description of the bodyguard job, saying they would travel with NFL teams and executives of big corporations like Microsoft. Kegel testified he found nothing odd in the notion that Pelayo, who was working as a security guard on a television series, was also a Homeland Security agent and a deputy sheriff.

Kegel's fiancée, Sondra Creed, testified Kegel told her he had an opportunity to work for Homeland Security as a bodyguard. In the summer of 2006, Pelayo's team met at the house Creed shared with Kegel. Creed could tell Kegel was excited about the project, and also that he was somewhat apprehensive because he paced around a lot and did not sleep much. Kegel began using an alias, Brock Sampson, on one of his email accounts. He told Creed he needed a different name to be in Homeland Security because the job was dangerous. Gomez testified he, too, was going to assume another name for his Homeland Security duties in order to protect his family.

Pelayo told Kegel and Gomez the FBI was after their bodyguard team and so was the Drug Enforcement Agency (DEA). He said the DEA had his house under surveillance. Garcia testified he gradually realized Pelayo was lying to them. He found out from Pelayo's sister that a man Pelayo had been describing as his FBI contact was actually his parole officer.

On December 18, 2006, Kegel quit his job on the Scrubs television show in order to devote himself full time to the bodyguard team. By mid-2007, Kegel believed he and Gomez were not just going to be part of the team, but they would be Pelayo's partners in running the bodyguard firm.

In the fall of 2007, Kegel went to the home of Rita Ramos Molina, the mother of Jose Benavidez, and he was present when Molina gave Pelayo money. Kegel testified he never intended to defraud Molina. He acknowledged, however, that when Pelayo introduced him to the family as a police officer, Kegel did not correct him.

Kegel testified he believed Pelayo was helping the Calvillo family with a legitimate insurance matter. He believed Pelayo was in a position to help because he had such good contacts with FBI agents, Homeland Security agents, and sheriff's deputies. When Kegel acknowledged he had told the Calvillo family he worked for an attorney, the following colloquy occurred:

"Q. Why did you say that you were an assistant to an attorney when in fact you were not?

"A. Because [Pelayo] wanted me to put the badge on again, and I didn't want to.

"Q. And so how does that relate to saying you were an assistant to an attorney? What's the difference between putting on a badge and saying you are an assistant to an attorney?

"A. Being assistant to an attorney is just a vague broad spectrum. I could be his pool man being an assistant to an attorney. Having a badge is specific."

Money was exchanged on several occasions, but anything Kegel collected he always handed over to Pelayo. Kegel believed this money was being used to pay for the various resources Pelayo was bringing to the investigation. Kegel testified he did not find it strange they were collecting cash for what were essentially public law enforcement services.

After his arrest and confession, Kegel was given a chance to explain his side of the story to Detectives Staley and Duncan. He told them that when he "lost" his job he found himself unable to make mortgage payments; he borrowed \$30,000 from a dangerous person who suggested that he defraud Casillas. This was a lie Kegel told the detectives in order to save Pelayo.

Kegel testified he never received any part of the \$45,000 the two families had handed over. It wasn't until late November 2007, after speaking to some of Pelayo's relatives and associates, that Kegel realized everything had been a lie.

Creed testified she and Kegel shared finances and that, after Kegel quit his job on the television show, she was working full time and they had \$97,000 in the bank.



She denied they were having problems keeping up with their mortgage payments in September 2007.

### **CONTENTIONS**

1. The trial court improperly admitted evidence of Kegel's confession.
2. The convictions must be reversed because the trial court was biased against Kegel.
3. The trial court violated Kegel's rights by not allowing him to present a complete defense.
4. The trial court erred by not ordering Kegel to pay victim restitution jointly and severally with Pelayo.

### **DISCUSSION**

1. *Kegel's confession was properly admitted.*

Kegel contends the trial court erred by admitting his confession into evidence. This claim is meritless.

#### *a. Background.*

At an evidentiary hearing, Detective Staley testified he and his partner Detective Duncan initially contacted Kegel on November 6, 2007, the day of his arrest, in an interview room at the Sheriff's station. The first thing the detectives said to Kegel was that he had been arrested for impersonating a police officer and for fraudulently taking money. Kegel nodded and said, "Yes." Duncan then told Kegel that a son of the defrauded family was a Marine who had completed a tour of duty in Iraq, returned home to California, and had been murdered. Kegel said "he had no idea that she was a Marine's mom, and that, if he had known that, he wouldn't have ripped her off, and he felt like shit and he . . . felt bad for doing that." Detective Staley testified Kegel had not been asked any questions before he made this statement.

After the trial court ruled Kegel's statement was admissible, because it had not been made during an interrogation, Staley testified in open court that when Duncan said "one of the victims in this case was the family and the mother of a Marine who had finished a combat tour in Iraq only to come back here to California and get murdered,"

Kegel “said he didn’t know that she was a Marine’s mom and, had he have known that, he would not have ripped her off. He felt like shit, and he’s sorry that it happened.” Kegel was then given a *Miranda* warning,<sup>3</sup> waived his right to remain silent, and told the detectives “that basically . . . this was his idea, that Mr. Pelayo was merely a translator for the families, that he [i.e., Kegel] had gotten into . . . some financial trouble. He was losing his home and borrowed \$30,000 from – he would only describe the person as ‘a dangerous person’ to us, and that he needed the money to pay this person back. There were some threats to his family and kids and stuff.”

b. *Discussion.*

Kegel contends admission of his confession violated his *Miranda* rights. He argues the trial court was wrong to rely on *People v. Haley* (2004) 34 Cal.4th 283, a case where the defendant, just after his arrest, was told by a detective the police knew he had committed a murder because his fingerprints were found at the scene. We disagree with Kegel’s argument.

*Haley* explained the controlling legal principle: “A defendant who is in custody, as here, must be given *Miranda* warnings before police officers may interrogate him. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 297 [64 L.Ed.2d 297, 100 S.Ct. 1682] (*Innis*).) In *Innis*, the high court defined the term ‘interrogation,’ stating that ‘the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602].

protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.’ [Citation.]” (*People v. Haley, supra*, 34 Cal.4th at p. 300.)

*Haley* then held: “Detective McCann told defendant, in effect, that ‘he knew he did it because his fingerprint was found at the scene.’ *The detective did not phrase this statement as a question, and this statement did not call for an incriminating response.* A brief statement informing an in-custody defendant about the evidence that is against him is not the functional equivalent of interrogation because it is not the type of statement likely to elicit an incriminating response.” (*People v. Haley, supra*, 34 Cal.4th at p. 302, italics added.)

Kegel argues his situation is different because he had been in custody for nine hours and then taken to an interview room for the obvious purpose of interrogating him. But this argument misses the key point: the crucial issue is not how long after his arrest the conversation occurred, but whether the detective’s statement constituted interrogation, i.e., whether what Duncan said to Kegel constituted express questioning or its functional equivalent. The trial court did not err by concluding it was neither. Duncan’s statement was not phrased as a question, nor did it call of an incriminating response. That Kegel volunteered a response does not mean he was interrogated within the meaning of *Miranda*.

Kegel also argues the failure to give him a *Miranda* warning until after he confessed constituted the kind of “question-first” technique condemned by *Missouri v. Seibert* (2004) 542 U.S. 600 (124 S.Ct. 2601). Not so.

*Seibert* condemned an interrogation tactic in which a suspect is intentionally interrogated without a *Miranda* warning in the hope that incriminating statements will be made. If they are, *Miranda* is then given and the interrogation continues with the aim of eliciting the same incriminating statements again: “This case tests a police protocol<sup>4</sup> for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda* . . . , the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*’s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible.” (*Missouri v. Seibert*, *supra*, 542 U.S. at p. 604.)

Kegel’s case is nothing like *Seibert*. Duncan did not interrogate Kegel *before* Kegel confessed. And after giving the *Miranda* warning, the detectives did not try to elicit the same inculpatory statement. Rather, they gave Kegel an opportunity to explain his side of the story. Finally, there is absolutely no evidence Detectives Staley and Duncan were engaged in a deliberate strategy to undermine *Miranda*.

The trial court did not err by admitting evidence of Kegel’s confession.

2. *There is no evidence the trial court was biased against Kegel.*

Kegel contends the trial court was biased against him. He argues this bias was revealed by the way the trial court intervened in the examination of witnesses and by various rulings the court made. This claim is meritless.

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<sup>4</sup> The police officer in *Seibert* “testified that he made a ‘conscious decision’ to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question ‘until I get the answer that she’s already provided once.’ ” (*Missouri v. Seibert*, *supra*, 542 U.S. at pp. 605-605.)

a. *Questioning of witnesses.*

Kegel claims the trial court's intervention in the questioning of witnesses consistently favored the prosecution, thus demonstrating the court's bias against him. However, the trial record does not support this assertion.<sup>5</sup>

"A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citations.] The court may not, however, assume the role of either the prosecution or of the defense. [Citation.] The court's questioning must be 'temperate, nonargumentative, and scrupulously fair' ' [citation], and it must not convey to the jury the court's opinion of the witness's credibility. [Citation.]" (*People v. Cook* (2006) 39 Cal.4th 566, 597.) "A court may control the mode of questioning of a witness and comment on the evidence and credibility of witnesses as necessary for the proper determination of the case. [Citations.] Within reasonable limits, the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. [Citation.] A court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution." (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206-1207.)

Kegel argues the trial court's conduct here was similar to what occurred in *People v. Santana, supra*, 80 Cal.App.4th 1194, where we reversed the defendant's conviction because of the way the trial court questioned several witnesses. The record in *Santana* "reveal[ed] the trial court repetitiously, disparagingly and prejudicially questioned defense witnesses," and "[b]y belaboring points of evidence that clearly were adverse to Santana, the trial court took on the role of prosecutor rather than that of an impartial judge. By continuing this adversarial questioning for page after page of

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<sup>5</sup> Although the Attorney General argues Kegel waived this claim by not objecting below, we address the issue in order to avert any claim of ineffective assistance of counsel. (See *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 310.)

reporter's transcript, the trial court created the unmistakable impression it had allied itself with the prosecution in the effort to convict Santana." (*Id.* at p. 1207.)

Kegel has not pointed out anything in his trial record comparable to what took place in *Santana*, where the trial court went after several witnesses so doggedly it was acting, in effect, as a prosecutor. Although the trial court here asked lots of questions, it questioned both defense and prosecution witnesses, and the interventions did not go on "page after page" as happened in *Santana*. The bulk of the questioning cited by Kegel was either aimed at clarifying the substance of a witness' testimony, or it was entirely structural, e.g., directing a witness to speak more slowly or answer only the precise question asked. The trial court's questioning of witnesses did not reveal a bias against Kegel.

b. *Perjury warning.*

At one point during Kegel's testimony, the trial court dismissed the jury and cautioned Kegel against committing perjury. The incident arose when defense counsel asked if, at some point, Kegel had begun to fear for his own safety:

"Q. From what source did you develop this fear?

"A. From Martin Pelayo.

"Q. How so?

"A. The descriptions and things that he said.

"Q. About what?

"A. About what occurred after he was taken into custody and the circumstances surrounding his, I have to call it abduction is what he said.

"The Court: His what?

"The Witness: Abduction.

"The Court: Abduction by whom?

"The Witness: The L.A. County Sheriffs, the deputies that took him.

"The Court: He said that was an abduction?

"The Witness: Yes.

“The Court: And you found on the Internet that he had been arrested and incarcerated; is that right?

“The Witness: Yes.

“The Court: Okay. [¶] I’m going to have the jury go back in the jury room for a few moments, please. Keep in mind my admonitions.”

After the jurors left the courtroom, the following colloquy occurred:

“The Court: You know, a lot of this, number one, is hearsay, and, number two, you’re under oath. [¶] Do you understand that, Mr. Kegel?

“The defendant: Yes, Sir.

“The Court: And if I become convinced at all that you’re making up some sort of broad story, I’m going to make sure that that’s taken to the proper authorities. [¶] Do you understand that?

“The defendant: Yes, Your Honor.

“The Court: Okay. Don’t give me this, ‘Yes, Your Honor,’ and that innocent look. I know exactly what’s going on.”

As authority that this amounted to judicial misconduct, Kegel cites the perjury warning given in *People v. Steinfeld* (1940) 38 Cal.App.2d 280. The trial court there told the defendant: “ ‘I don’t believe a word you say, Steinfeld, You know you are lying. You would be a lot better off if you come through with the truth. Since you want to lie about it – ’ ” (*Id.* at p. 282.) When Steinfeld insisted he wasn’t lying, the trial court said, “ ‘Oh, don’t give me that stuff, go on, that is all.’ ” (*Ibid.*) But a key difference between these two cases is that Steinfeld had a court trial, not a jury trial, and the comments Kegel is complaining about were not made in the presence of his jury.

And while the trial court’s final remark to Kegel was intemperate, it appears the court was reacting both to Kegel’s demeanor and to the fact he was in the middle of telling a fairly incredible story: that even though he knew Pelayo had been arrested and taken into custody by law enforcement officials, Kegel chose to believe Pelayo’s abduction account. Moreover, even after finding judicial misconduct in *Steinfeld*, the Court of Appeal affirmed the defendant’s conviction because there was no resulting

prejudice. We would not find any prejudice here either because Kegel was not intimidated into changing his testimony. After the perjury warning, Kegel testified he experienced “shock and worry” about being associated with Pelayo because of what had happened to him, and that he started using the name Brock Sampson to protect himself “[f]rom being injured or killed due to [his] relation to Martin Pelayo.”

*c. Related complaints.*

Kegel argues the trial court’s ruling admitting his confession into evidence revealed the court’s anti-defendant bias. But as discussed *ante*, the trial court’s ruling was legally correct and thus did not demonstrate bias against Kegel.

Kegel asserts “[t]he judge became an advocate when he humiliated Ms. Creed and undermined her responses to the judge’s questions of how she perceived changes in appellant’s mood.” However, the passage cited by Kegel demonstrates no such thing. Creed kept testifying outside the bounds of the questions she was asked, and the trial court was merely directing her to respond properly.

Kegel argues “the judge became an advocate for the government by eliciting evidence from witnesses that was irrelevant and damning to appellant’s defense. That behavior convinced the jury that appellant was guilty.” However, Kegel fails to even specify what evidence he is referring to here. So far as we can see, the evidence against Kegel was prejudicial to him only in the sense it was inculpatory, starting with his confession to the detectives that he felt terrible about having ripped off the family of a Marine.

In sum, we have not been directed to any part of the record establishing that the trial court was biased against Kegel.

*3. Kegel was not denied the right to present a complete defense.*

Kegel contends the trial court infringed on his right to present a complete defense by preventing him from introducing certain evidence. This claim is meritless.



a. *Evidence Pelayo was stealing money from Kegel.*

A key element of the defense was that Pelayo had convinced Kegel their dealings with the Benavidez and Calvillo families were entirely legal and actually helped the families, and that Kegel therefore never intended to defraud the victims. Kegel complains the trial court prevented him from putting on evidence that would have bolstered this innocent-intent defense. He asserts the trial court would not let Sondra Creed testify about money she and Kegel had paid Pelayo, arguing this evidence that Pelayo had swindled them would have shown Kegel was just another of Pelayo's victims.<sup>6</sup> But this evidence was excluded under the normal rules of evidence when it became clear Creed could not say Pelayo had actually stolen this money, but only that certain sums had been paid to him. Kegel has not, on appeal, challenged the propriety of any of these individual evidentiary rulings; he merely makes an omnibus claim that the trial court prevented him from putting on a complete defense.

b. *Evidence Kegel falsely confessed to protect Pelayo.*

Kegel argues another key element of his defense was that he falsely confessed in order to protect Pelayo from the Sheriff's Department, because he believed the sheriffs had abducted Pelayo and killed Pelayo's children, but the trial court prevented Kegel from testifying about this. But Kegel did testify about Pelayo's purported abduction by the Sheriff's Department. He also testified Pelayo told him Molina's home "was the place where his children had been killed [in] an alleged drive-by shooting . . . ." Although Kegel did not testify the Sheriff's Department had been responsible for the shooting, it does not appear he was stopped from doing so.

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<sup>6</sup> Citing the same page of the reporter's transcript, Kegel also complains the trial court "did not allow Ms. Creed to testify about meetings that she observed between Mr. Pelayo and appellant, which would have shown how Mr. Pelayo controlled appellant." However, the portion of the record cited by Kegel relates solely to the money issue. And Creed did testify about meetings that were held at the house she shared with Kegel.

4. *Victim restitution order was arguable ambiguous.*

Kegel contends the trial court erred by ordering him to pay full victim restitution in the amount of \$45,000, while ordering Pelayo to pay the same amount jointly and severally.<sup>7</sup> He argues this was an abuse of discretion “because Penal Code section 1202.4 provides the restitution order shall reflect the ‘economic loss incurred as a result of the defendant’s criminal conduct . . .’ [Citation.] The court failed to consider that Mr. Pelayo was at least half responsible for the crimes against the two families.”

The Attorney General properly notes that, while a trial court may order joint and several restitution liability, it is not required to do so. “Section 1202.4, subdivision (f) requires restitution ‘[i]n every case in which a victim has suffered economic loss as a result of the defendant's conduct.’ . . . Under this statutory language, the courts have found that if two defendants convicted of the same crime caused a victim to suffer economic loss, a court may impose liability on each defendant to pay the full amount of the economic loss, as long as the victim does not obtain a double recovery. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535 . . . .)” (*People v. Leon* (2004) 124 Cal.App.4th 620, 622, italics omitted.)

However, having ordered Pelayo to pay victim restitution jointly and severally with Kegel, it appears the trial court may have intended to make a corresponding order as to Kegel. Inasmuch as the matter must be sent back to the trial court for a correction of the abstract of judgment, see *post*, we will ask the trial court to take a look at this and modify its restitution order should that be what it intended.

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<sup>7</sup> The Attorney General complains the two-page document we have taken judicial notice of “is incomplete, as it does not reflect the complete sentencing record in Pelayo’s case, nor does it include any reporter’s transcript of the Pelayo sentencing that may shed light on the court’s sentencing determination.” Be that as it may, Kegel has submitted at least one document that is clearly a trial court minute order stating: “The Court orders the defendant to pay victim restitution pursuant to Penal Code section 1202.4(f). The monies are to be joint and several with the codefendant, Frank Kegel.”

5. *Correct abstract of judgment.*

The abstract of judgment appears to contain a clerical error. Although Kegel was convicted in count 7 of unlawful use of a peace officer's badge in violation of section 538d, subd. (b)(2), that conviction is not reflected in the abstract of judgment. We will order this error corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [it is proper and important to correct errors and omissions in abstracts of judgment].)

**DISPOSITION**

The judgment is affirmed. The trial court shall correct the error in the abstract of judgment and determine if it intended to impose joint and several victim restitution on Kegel. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.